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(3)

No. 06-1640

In The

Supreme Court of the United States

ERROL D. BEUMEL, JR.,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition For Writ Of Certiorari To The Indiana Supreme Court

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are a defendant's Sixth Amendment rights under *Blakely v. Washington* violated by submitting a redundant list of derivative aggravators to a sentencing-phase jury, and requiring it to make determinations that are beyond the competence of a lay jury?

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Errol D. Beumel, Jr. respectfully states as follows in reply to the State of Indiana's Brief in Opposition to the Petition.

ARGUMENT

I. Any Due-Process Issue Implicit in Mr. Beumel's Petition Is a *Subset* of the Question Presented — Not a Separate, Unpresented Issue.

Tellingly, the State of Indiana makes no effort to deny the constitutional repugnance of Mr. Beumel's sentence. Instead, it quibbles with his Question Presented, claiming his constitutional injury was more like Due Process than the Sixth Amendment, and should therefore be ignored entirely. But that argument misstates the real Question Presented, short-changes the interests at stake under the Sixth Amendment, and misreads S. Ct. Rule 14.1(a).

First, the State constructs a straw man by claiming that Mr. Beumel's question was merely "whether submitting aggravators to a jury violates the Sixth Amendment," then attacks that misstated question as "bewildering." Response at 11. Though such a question would indeed be patently nonsensical in light of *Blakely v. Washington*, it is not the question Mr. Beumel has actually raised. Instead, his real claim is that "submitting a *redundant* list of *derivative* aggravators" to the jury is constitutionally infirm. *See* Petition for Writ of Certiorari, p. *i* (emphases added). Only by ignoring the two most-critical words in the Question Presented can the State so blithely dismiss such a significant question.

Next, the State notes the strong Due Process overtones of Mr. Beumel's substantive arguments, in order to fault his Question Presented for being framed in Sixth Amendment terms. But Due Process implications are inherent in the Sixth Amendment — because like Due Process, it is both procedural (by prescribing the jury mechanism at all) and substantive (by regulating *which* facts must be determined through that mechanism, as *Blakely* and its forebears illustrate). As *Blakely* noted, the jury right "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure," serving to "ensure [the people's] control in the judiciary." 542 U.S. 296, 305-06 (2004). When the State skews sentence-phase instructions to goad the jury towards an aggravated sentence, it does more than intrude into the Due Process rights of a particular accused — it manipulates one of the few checks the people as a whole wield against the power of the judiciary. Thus, even though it may be helpful to view Mr. Beumel's constitutional injury through a Due Process lens on the individual level, that does not diminish its broader Sixth Amendment implications.

Accordingly, whether cast as Sixth Amendment or Due Process, Mr. Beumel has properly presented his question for this Court's review. This Court's attention under Rule 14.1(a) is not limited to issues that can be superficially spotted "from a galloping horse" on the face of a Question Presented. Rather, the plain language of the Rule provides that this Court will consider "questions set out in the petition, *or fairly included therein*" (emphasis added). The Rule's purpose, though important, is simply prudential — it prevents a respondent from being blindsided, and "relieves [it] of . . . the burden of opposing certiorari on unpresented questions." *Yee v. City of Escondido*, 503 U.S. 519, 536 (1992); *accord*, Response at 13 (quoting *Yee*). Those concerns are greatest *after* a grant of certiorari — for

example, using merits briefs to "smuggl[e] additional questions into a case after [the Court] grant[s] certiorari." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Philips Corp.*, 510 U.S. 27, 34 (1993) (internal quotation omitted).

By contrast, when this Court finds *before* granting review that a petition raises a meritorious issue beyond what is expressly presented, the Order granting certiorari will occasionally "rephrase[ ] the question presented by a petitioner" — or even "request[ ] the parties to address an important question of law" that the petition had not raised at all. *Yee*, *supra*, 503 U.S. at 535, *citing Ankenbrandt v. Richards*, 502 U.S. 1023 (1992) and *Payne v. Tennessee*, 498 U.S. 1080 (1991).

Here, the purposes of Rule 14.1(a) have been (or easily can be) accomplished. First, the State has not in any way been sandbagged. To the contrary, it readily identified the Due Process overtones of Mr. Beumel's Sixth Amendment question — which tends to indicate that even its reframed question is "fairly included" in the one Mr. Beumel has raised. If the Court would prefer to grant review on that narrower basis, its order granting certiorari may simply say so, to keep any new issue from being "smuggled" into the merits briefing. But whether in broad Sixth Amendment or narrow Due Process form, Mr. Beumel's basic question is properly before this Court.

II. Mr. Beumel's Question Has Been Sufficiently Preserved for This Court's Review.

The State next argues that Mr. Beumel's claims have been waived, again hoping to avoid addressing them on the merits. First, it admits Mr. Beumel has consistently objected to the sentencing-phase jury instructions throughout this case — yet claims he waived review by having also

advanced an alternative argument in the trial court that supposedly "betray[s his] preference not to involve the jury in sentencing at all." Response at 14. But that misrepresents Mr. Beumel's trial-level argument, which was merely that *if* the "doctrine of amelioration" (a State-law rule) did not require the court to apply Indiana's new indeterminate sentencing system, *then* it would have to ensure the constitutionality of the *ad hoc* jury procedures it would need to graft onto the old determinate system. Such alternative arguments do not constitute waiver. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 573 n. 1 (1991) ("[T]he State's argument below was in the alternative: (1) that the statute does not implicate the First Amendment . . . , and (2) that the statute in any event survives First Amendment scrutiny . . . . The second argument can be claimed to contradict the first . . . ; but it certainly does not waive or abandon it.") (Scalia, J., concurring). Accordingly, the Question Presented is not waived.

III. When This Court Reviews a Case, It Addresses the Whole Nation, Not Just the Case's State of Origin — and This Case Would Guide the States That Still Use Determinate Sentencing.

Finally, the State argues this case presents no significant issue for review because Indiana "has now scrapped determinate sentencing altogether." Response at 18. But that contention ignores the authorities discussed in Mr. Beumel's petition, and reflects a myopic view of the nature of certiorari.

First, the State claims Mr. Beumel has failed to show how his case raises "a matter of pressing national concern," or that the errors in his case are common. Response at 17. But his Petition discussed how post-*Blakely* scholarship has anticipated these very problems (arising from "anchor" and "decoy" effects), and recognized that this Court would

likely need to "further develop[ ] its Sixth Amendment jurisprudence" even beyond its *Blakely* followup in *United States v. Booker*, 543 U.S. 220 (2005). *See generally* Petition at 9-13, *quoting* J.J. Prescott and Sonja Starr, *Improving Criminal Jury Decision Making after the* Blakely *Revolution*, 2006 U. ILL. L. REV. 301 and Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Sentencing Reform*, 58 STAN. L. REV. 235 (Oct. 2005). It is hardly surprising that problems that were so readily predicted in theory have indeed arisen in practice — nor, contrary to the State's claims (*see* Response at 18), does it require any "blind faith" to recognize they are likely to recur without this Court's intervention and guidance.

Finally, the State concludes its Response by noting Indiana's abolition of determinate sentencing, and argues "[i]f the Court is looking for a post-*Blakely* jury-sentencing scheme to review, it should wait for a case from a State that actually has one." Response at 18. That rationale helps explain the high *State* Court's denial of discretionary review, but suggests a markedly short-sighted and provincial idea of *this* Court's review.

On certiorari, this Court addresses the entire Nation through its analysis; the particular State to which the resulting mandate is issued is little more than a historical footnote. Although this Court "evaluate[s] state procedures one at a time, as they come before" the Court for review, *Smith v. Robbins*, 528 U.S. 259, 275 (2000), it does not do so for the benefit of a particular litigant — even when that litigant is a State — but because of the importance of the *issue* involved. *See generally* S. Ct. Rule 10 (describing "the character of reasons the Court considers" in whether to grant certiorari).

Here, Mr. Beumel's type of constitutional injury could have been inflicted — and could be inflicted again — in *any* State with jury sentencing, regardless of whether Indiana is still one of them. His case provides an opportunity to refine the State-level implementation of *Blakely* to prevent future defendants from being subjected to the same harms. If review is to be denied, it should be for a reason more compelling than the State of Indiana's loss of motivation to find rationalizations for the constitutionally repugnant procedure to which Mr. Beumel was subjected.

CONCLUSION

For all of the foregoing reasons, Petitioner Errol D. Beumel, Jr. again respectfully prays this Court for a Writ of Certiorari to the Indiana Supreme Court.

Respectfully submitted,

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